STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2014
v DONALD CLARK WARNER, Defendant-Appellant.	No. 311034 Wayne Circuit Court LC No. 11-011795-01-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DONALD WAYNE CUMMINGS, Defendant-Appellant.	No. 311215 Wayne Circuit Court LC No. 11-011795-03-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TIMOTHY EUGENE SAMPSON, Defendant-Appellant.	No. 315252 Wayne Circuit Court LC No. 11-011795-02-FC

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendants Donald Warner, Donald Cummings, and Timothy Sampson were tried jointly, before a single jury. The jury convicted defendant Warner of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree murder, MCL 750.157a and

MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b. The court sentenced Warner to concurrent terms of life imprisonment for the first-degree murder and conspiracy convictions, and 2 to 10 years for the felon-in-possession conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm conviction.

The jury convicted defendant Cummings of conspiracy to commit first-degree murder, tampering with evidence, MCL 750.483a, and disinterment or mutilation of a dead body, MCL 750.160. The court sentenced Cummings to life imprisonment for the conspiracy conviction, and concurrent prison terms of 1 to 10 years each for the tampering with evidence and disinterment convictions.

The jury convicted defendant Sampson of first-degree premeditated murder, conspiracy to commit first-degree murder, solicitation of murder, MCL 750.157b, felon in possession of a firearm, and felony-firearm. The court sentenced Sampson as a fourth habitual offender, MCL 769.12, to concurrent terms of life imprisonment for the first-degree murder, conspiracy, and solicitation convictions, and two to five years for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. All three defendants appeal as of right. We affirm Warner's and Cummings's convictions and sentences in Docket Nos. 311034 and 311215, respectively. In Docket No. 315252, we vacate defendant Sampson's conviction and sentence for solicitation of murder, but affirm in all other respects.

Defendants' convictions arise from the death of Brandon Buck, whose unrecognizable body was discovered inside a burning minivan during the early morning hours of April 18, 2011. In September 2011, a witness, Ayesha White, came forward and reported observing the events that led to Buck's death. White was the only witness to the events, and was the only reason authorities were able to determine whose body was found in the van. White stated that she was present when Warner, at Sampson's direction, shot Buck. Afterward, Cummings obtained a minivan and Buck's body was placed inside, and then Cummings poured gasoline inside the minivan and set it on fire. An autopsy determined that Buck was already dead before the fire, having died from multiple gunshot wounds.

I. FAILURE TO APPOINT AN EXPERT WITNESS

At trial, White testified that she used Ecstasy and drank numerous shots of tequila during the hours leading up to Buck's death. Defendants Warner and Sampson both argue that the trial court violated their right to due process by failing to appoint an expert witness to assist a jury in understanding how White's ingestion of drugs and alcohol affected her ability to perceive and recall details of the offense.

In *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006), we set forth the standards of review on this issue:

> This Court reviews for abuse of discretion a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness. MCL 775.15. The abuse of discretion standard recognizes " 'that there will be circumstances in which there will be no single correct outcome; rather, there will

> be more than one reasonable and principled outcome.' " *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Under this standard, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

A trial court is not obligated to provide funding for the appointment of an expert witness on demand. *Carnicom*, 272 Mich App at 617. Rather,

> [t]o obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). It is not enough for the defendant to show a mere possibility of assistance from the requested expert. *Tanner*, [469 Mich 437, 443; 671 NW2d 728 (2003)]. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Jacobsen*, [448 Mich App at 641. [*Carnicom*, 272 Mich App at 617.]

An evaluation of the need for expert testimony under this standard comports with due process. *People v Leonard*, 224 Mich App 569, 580-583; 569 NW2d 663 (1997), habeas corpus relief granted on other grounds *Leonard v Michigan*, 256 F Supp 2d 723 (WD Mich, 2003).

White's credibility, as affected by her ability to accurately recall events, was a central issue in this case because she was the only eyewitness to the events. And, White admitted having consumed large amounts of alcohol and taken an Ecstasy pill on the day of the offense. The trial court was unwilling to appoint a toxicologist, however, because defendants admittedly had no toxicology reports showing how much drugs or alcohol were in White's system. Although defendants also asked the court to appoint a drug counselor who could offer expert testimony with respect to White's ability to recall events accurately, defendants never presented an offer of proof showing either what type of testimony a drug counselor could provide or even indicating that a drug counselor was qualified to offer testimony regarding the physical effects of alcohol or Ecstasy on a person's brain functioning or memory. The trial court expressed a willingness to reconsider the request for appointment of an expert if an appropriate showing was made, but defendants never renewed their request.

The trial court also correctly determined that defendants failed to demonstrate that they would not be able to adequately explore and develop this issue of White's drug and alcohol use as it related to her ability to perceive and recall events without the appointment of an independent expert. This absence of need was in large part due to the fact that at trial the parties were allowed to question the medical examiner, Dr. Schmidt, regarding the general effect of drugs and alcohol on a person's memory and perception. Dr. Schmidt stated that alcohol can compromise both memory and perception, and that when alcohol is combined with other drugs, it will make the effects of those substances more pronounced. He explained, however, that individuals metabolize or react differently to certain drugs, and that "[t]he only real way to assess how one reacts to alcohol is by actually witnessing the person drinking the alcohol."

Dr. Schmidt's testimony provided defendants with a scientific and medical basis for arguing to the jury that White's admitted use of Ecstasy and alcohol affected her ability to accurately perceive and recall the events surrounding the charged offense. Dr. Schmidt identified several factors that influence how drugs or alcohol will affect a particular person, including the physical size of the person, the length of time the person has been consuming the substance, and whether the person's history of usage may have enabled the person to develop a tolerance for the substance, and defendants were permitted to explore all of these issues in their cross-examination of White, thus providing the jury with a basis (other than the jurors' own common sense) for evaluating the reliability of her testimony as measured by the factors identified by Dr. Schmidt. Defendants have not explained what additional testimony a different expert could have provided to assist the jury in its evaluation of White's ability to perceive and recall events. Accordingly, the trial court did not abuse its discretion by denying defendant Warner's and defendant Sampson's requests for the appointment of an expert witness.

II. DEFENDANT WARNER'S REMAINING ISSUE IN DOCKET NO. 311034

Warner also argues that trial counsel was ineffective for not moving to suppress evidence seized at the time of Warner's and Cummings' arrests. Because Warner did not raise an ineffective assistance of counsel claim in the trial court, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, Warner must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced him that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

The jury heard that, after a period of police surveillance, Warner and Cummings were arrested following a traffic stop of a vehicle in which they were passengers. A green bag that Cummings had placed in the trunk of the vehicle contained two handguns and many pills, similar to Ecstasy. Warner argues that his attorney was ineffective for failing to challenge the search as invalid under *Arizona v Gant*, 556 US 332; 129 S Ct 1710; 173 L Ed 2d 485 (2009), because it extended beyond the area immediately accessible to either Warner or Cummings.

In order to challenge the search of a vehicle under *Gant*, however, a person must have standing to challenge the search. *People v Lombardo*, 216 Mich App 500, 505; 549 NW2d 596 (1996). In this case, Warner does not identify any evidence indicating that he had a possessory interest in either the vehicle or the backpack. Accordingly, he has not demonstrated that he has standing to challenge the search of the vehicle or the seizure of the backpack. *People v Earl*, 297 Mich App 104, 108; 822 NW2d 271 (2012), aff'd on other grounds 495 Mich 33; *People v Armendarez*, 188 Mich App 61, 71; 468 NW2d 893 (1991). Therefore, defense counsel cannot be deemed ineffective for failing to file a motion to suppress. Counsel is not ineffective for failing to raise a futile motion. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

III. SUFFICIENCY OF THE EVIDENCE AS TO DEFENDANT CUMMINGS

Defendant Cummings argues that the prosecution failed to present sufficient evidence to support his conviction for conspiracy to commit first-degree premeditated murder. "In determining whether the prosecution presented sufficient evidence to sustain a conviction, this

Court must construe the evidence in the light most favorable to the prosecution and consider whether a rational trier of fact could have determined that all the elements of the crime were proven beyond a reasonable doubt." *People v Schaw*, 288 Mich App 231, 233; 791 NW2d 743 (2010). Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of a crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Jackson*, 292 Mich App 583, 587-588; 808 NW2d 541 (2011).

The crime of conspiracy involves two or more persons voluntarily agreeing to effectuate the commission of a criminal offense. There must be evidence that the individuals specifically intended to combine to commit a crime. *People v Justice (After Remand)*, 454 Mich 334, 345-346; 562 NW2d 652 (1997). Direct proof of a conspiracy is often difficult to acquire and is not necessary. A conspiracy can be shown from the circumstances, acts, and conduct of the parties. *Id*. at 347. Conspiracy to commit first-degree murder requires proof beyond a reasonable doubt that the conspirators deliberated and planned the crime with the intent to kill the victim. *Jackson*, 292 Mich App at 588-590.

The evidence indicated that Cummings acted in concert with Warner and Sampson, before, during, and after the offense. Evidence was presented that Cummings joined Warner in chasing Buck after Warner shot Buck, after having heard Sampson direct Warner to retrieve a gun from Buck and to kill him. This evidence supported an inference that Cummings intended to combine with Simpson and Warner to kill Buck. Although Cummings's actions in orchestrating the disposal of Buck's body by setting the van on fire to cover up the murder involved conduct after the murder was committed, that conduct – in conjunction with the other evidence – was still probative of Cummings's intent to act in unison and combine with Warner and Sampson to kill the victim. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that Cummings conspired with Warner and Sampson to murder Buck.

IV. JUDGMENTS OF SENTENCE

Defendants Cummings and Sampson both argue that it is necessary to correct their judgments of sentence to clarify their eligibility for parole for their conspiracy to commit first-degree murder convictions. For both Cummings and Sampson, the trial court imposed a sentence of life imprisonment for the conspiracy to commit first-degree murder conviction, consistent with MCL 750.157a and MCL 750.316. As Cummings and Sampson both correctly observe, a defendant convicted of conspiracy to commit murder and sentenced to life imprisonment is eligible for parole. See *People v Jahner*, 433 Mich 490; 446 NW2d 151 (1989). Defendants argue, however, that their parole eligibility may be affected because the judgments of sentence refer to MCL 750.316, the statute for first-degree murder, instead of MCL 750.157a, the conspiracy statute.

The judgment of sentence for each defendant accurately identifies the conviction offense as "Conspiracy to commit 1st degree murder." In the column of the judgment of sentence

marked "MCL citation/PACC Code," Cummings's judgment specifies "750.316A[C]" and Sampson's judgment specifies "750.316[C]." According to the *Bench Guide: Criminal Records Reporting, MCL/PACC Charge Codes* (11th ed, 2003), "[a] conspiracy charge is listed as the PACC charge code followed by a bracketed "C", (i.e. Conspiracy to Commit Homicide Murder - First Degree is 750.316[C])." Here, the judgment of sentence for each defendant properly lists the PACC charge code for first-degree murder, followed by a bracketed "C," thereby designating the conviction as one for conspiracy to commit first-degree murder, as clearly stated on the face of the judgment of sentence. In addition, there is nothing in the description of either defendant's life sentence for conspiracy to suggest that it is not subject to parole consideration. Accordingly, remand for correction of the judgments of sentence is not necessary.

V. SUFFICIENCY OF THE EVIDENCE AS TO DEFENDANT SAMPSON

Defendant Sampson argues that the prosecution failed to present sufficient evidence to support his convictions for first-degree premeditated murder, conspiracy to commit murder, and solicitation of murder.

A conviction of first-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation requires "sufficient time to allow the defendant to take a second look." *Jackson*, 292 Mich App at 588. Premeditation and deliberation can be inferred from the surrounding circumstances. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. To find that a defendant aided and abetted a crime, the prosecution must show that "(1) the crime charged was committed by the defendant or another person, (2) the defendant performed acts or gave encouragement that assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); see also *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006). An aider and abettor's state of mind may be inferred from all the facts and circumstances of the crime. *Carines*, 460 Mich at 757.

Although the evidence showed that it was Warner who shot Buck, White testified that it was Sampson who directed Warner to do so. According to White, Sampson told Warner, "If he has my gun, kill that [expletive]." This evidence was sufficient to enable the jury to find beyond a reasonable doubt that Sampson aided and abetted Buck's shooting death through his verbal command to Warner, and that Sampson's directive to kill Buck demonstrated that Sampson had a deliberate and premeditated intent to kill Buck. Although Sampson asserts that the evidence showed only that he instructed Warner to "shoot" Buck, not "kill" him, White testified that she was certain that Sampson used the word "kill." Although Sampson asserts in a pro se Standard 4 brief that White's testimony was not credible, the credibility of White's testimony was for the jury to resolve. *Williams*, 268 Mich App at 419.

The evidence was also sufficient to support Sampson's conviction of conspiracy to commit first-degree murder. The evidence showed that Sampson and Buck were physically fighting before Sampson told Warner to check Buck's pockets for Sampson's gun. Sampson told Warner to kill Buck if Warner found the gun in Buck's pocket, which is exactly what Warner

did, even chasing Buck after Buck was initially shot and was able to run off. This evidence was sufficient to enable the jury to find beyond a reasonable doubt that Sampson and Warner intended to combine to murder Buck.

However, the prosecution concedes, and we agree, that the evidence was insufficient to support a conviction of solicitation of murder. For purposes of the solicitation statute, "solicit" is defined as an "offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation." MCL 750.157b(1). Although there was evidence that Sampson directed Warner to kill Buck, there was no evidence that Sampson offered Warner any money, services, or anything of value, or to forgive a debt or obligation, for killing the victim. Accordingly, we vacate Sampson's conviction and sentence for solicitation of murder.

V. DEFENDANT SAMPSON'S STANDARD 4 BRIEF

Defendant Sampson raises additional issues in a pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which has merit.

Sampson argues that the prosecutor engaged in misconduct that denied him a fair trial. Sampson did not object to the prosecutor's conduct at trial, so our review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 761-767. Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's conduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Although Sampson complains that the prosecutor made comments before the jury alluding to threats against witnesses by members of the defendants' families, the record discloses that the challenged comments were made when the jury was not present. Therefore, Sampson was not prejudiced by the remarks, and there was no plain error.[1]

The record also fails to support Sampson's argument that a juror who was unable to communicate in the English language was improperly permitted to serve on the jury in violation of MCL 600.1307a(1)(b). The record discloses that the three venire members who expressed difficulty understanding English were dismissed for cause. And, although one of the selected jurors advised the court during trial that she was having difficulty understanding the trial because English was her second language, after the parties rested, but before the jury began deliberations, all of the parties stipulated that the juror could be dismissed. Sampson's stipulation to dismiss the juror waived any claim of error associated with that juror. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

[1] We also reject Sampson's argument that it was improper for the prosecutor to call the officer-in-charge as the last witness at the conclusion of trial. There is no indication in the record that any witnesses were subject to a sequestration order, and as the designated representative for the people, the officer-in-charge would not have been subject to any sequestration order. MRE 615. There was no plain error in permitting his to testify after having sat through the trial proceedings.

Sampson next argues that the trial court erred in denying his request for a separate jury made the day prior to trial. The decision whether to provide a separate jury is within the discretion of the trial court and this Court will not reverse that decision absent an abuse of discretion. *People v Cadle (On Remand)*, 209 Mich App 467, 469; 531 NW2d 761 (1995). The sole basis for the request was that evidence admissible against defendants Warner and Cummings under MRE 404(b)(1) did not implicate Sampson. However, the trial court correctly observed that any prejudice to Sampson could adequately be cured by an instruction informing the jury that evidence admissible only against one defendant could not be considered against another defendant. Defense counsel agreed that such an instruction "would remedy the situation," and the instruction was provided. Under these circumstances, the trial court did not abuse its discretion in denying Sampson's request for a separate jury.

Sampson further argues that he was denied the effective assistance of counsel at trial. Although Sampson raises several ineffective assistance of counsel claims on appeal, only one was properly raised and developed in the trial court. With respect to the claim that was subject to an evidentiary hearing and considered by the trial court, namely, that counsel slept during critical portions of the trial, we review any findings of fact by the trial court for clear error, but review de novo the trial court's application of the constitutional standard to the facts found. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Our review of Sampson's remaining claims is limited to errors apparent from the record. *Matuszak*, 263 Mich App at 48.

To establish ineffective assistance of counsel, Sampson must show that counsel's performance fell below an objective standard of reasonableness, and that counsel's representation so prejudiced Sampson that he was denied the right to a fair trial. *Pickens*, 446 Mich at 338. To establish prejudice, Sampson must show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Id*. Ineffective assistance of counsel will not be found merely because a particular strategy backfires. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987). Rather, a strategy decision will support an ineffective assistance of counsel claim only if the strategy employed was not sound or reasonable. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present the particular defense and that the defense of which he was deprived was substantial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the trial's outcome. *Kelly*, 186 Mich App at 526.

Sampson argues that counsel was ineffective for failing to investigate his alibi claim and not calling alibi witnesses who could have established that he was not present at the scene of the

shooting. Although Sampson submitted an affidavit in which he avers that he informed defense counsel of two alibi witnesses, he has not submitted an affidavit from either proposed alibi witness. Without an offer of proof from the proposed alibi witnesses, Sampson has not demonstrated the necessary factual support for this claim and thus has not overcome the presumption that counsel's failure to call the witnesses was reasonable trial strategy or deprived him of a substantial defense.

Sampson also claims that counsel was ineffective for failing to impeach a prosecution witness, Dalon McClinton, with evidence that McClinton had shot both Sampson and Buck in 2006. However, the record discloses that McClinton was a reluctant prosecution witness whose testimony was generally favorable to Sampson. McClinton testified that he did not believe White when she initially stated what happened on the evening of April 18, and he stated that he was not fearful for his family because Sampson and Warner were like family to him. McClinton only expressed fear for his family after Warner and Cummings entered the family's home armed with a gun, looking for White, but Sampson was not involved in that incident. Because McClinton's testimony was not particularly significant to the outcome of the trial and was generally favorable to Sampson, there is no basis for concluding that defense counsel's failure to elicit evidence of the 2006 shooting incident was either unsound strategy or deprived Sampson of a substantial defense.

Sampson also argues that defense counsel was ineffective because he did not seek to suppress evidence related to Warner's and Cummings' arrests five months after the offense. However, defense counsel did oppose the evidence at a pretrial hearing on the prosecution's motion to admit the evidence against Warner and Cummings under MRE 404(b)(1). Sampson's counsel argued that the evidence did not apply to Sampson and should not be admitted against him at all or, alternatively, he should be afforded a separate jury. The trial court granted the prosecutor's motion to admit the evidence and advised Sampson's attorney that any request for a separate jury should be made by separate motion. Sampson's counsel later filed a motion for a separate jury, but the motion was denied. Sampson's argument simply has no foundation.

Defense counsel also allegedly failed to properly advise defendant regarding the use of prior convictions for impeachment, which prevented him from properly deciding whether to testify. As we just indicated, however, defense counsel actually did file a motion to prevent the prosecutor from using Sampson's prior convictions for unlawfully driving away an automobile (UDAA) and receiving or concealing a stolen motor vehicle for impeachment under MRE 609 if Sampson elected to testify at trial. The trial court denied the motion. At trial, Sampson stated on the record that he decided not to testify after discussing the matter with defense counsel. Sampson now argues on appeal that defense counsel was ineffective because he advised Sampson that the prosecutor would *also* be able to use for impeachment Sampson's prior juvenile adjudications and additional convictions for felony-firearm and carrying a concealed weapon.

Juvenile adjudications are generally not admissible for impeachment, MRE 609(e), and convictions for felony-firearm and carrying a concealed weapon would not generally be admissible for impeachment because those crimes do not contain an element of dishonesty, false statement, or theft, MRE 609(a)(1) and (2). However, whether defense counsel advised Sampson that these adjudications and convictions would have been admissible for impeachment

is not apparent from the record. In any event, because the record discloses that defense counsel and Sampson discussed whether Sampson would testify, that counsel was aware of the impeachment issue by seeking a pretrial ruling regarding the admissibility of Sampson's prior convictions for receiving or concealing stolen property and UDAA, and it is not apparent from the record that counsel misadvised Sampson regarding the use of his prior juvenile adjudications and convictions for carrying a concealed weapon and felony-firearm, we conclude that Sampson has failed to overcome the presumption that counsel's advice was within the range of professional competence.[2]

The record also does not support Sampson's claim that defense counsel was ineffective for failing to point out the many "contradictions, inconsistencies, and logical unlikelihoods and impossibilities" in White's testimony. Indeed, the record once again belies defendant's assertions. During his cross-examination of White, defense counsel elicited that White had been involved in a dating relationship with Sampson for four or five months, that she was only 17 years old at that time, and that she often used alcohol and Ecstasy. Counsel elicited from White that she had consumed both Ecstasy and numerous shots of tequila on the night of the offense, and pointed out that White had misidentified the color of the van. Counsel also questioned White about her ability to observe the events in the dark, eliciting that there were no streetlights or other light sources, other than the headlights of the van in which she was, and then eliciting that White had inconsistently described the shooting as having taken place both in front of the van and next to the van, and that the headlights were not pointed to the side of the vehicle. Counsel also elicited that, despite witnessing a murder, White did not go to the police, and waited three or four days before telling her stepmother what happened.

Likewise, in his closing argument, Sampson's counsel stated that "the whole case is really funneled through the credibility of Ms. White," and argued that there were many reasons to doubt White's testimony, including that (1) White testified that she heard glass breaking just before the victim was shot, but there was no evidence at trial of any broken windshield, (2) White testified that the headlights, the only light source, were facing forward, but she stated that she saw the events from the side, (3) White initially stated that the victim was shot once in the chest, but then after the autopsy was completed, she stated that he was shot twice in the chest, (4) White misidentified the color of the van that was set on fire, (5) White claimed that Sampson said to "kill" the victim, but White's stepmother testified that White reported that Sampson only said to "shoot" the victim, (6) that the drugs and alcohol that White admitted consuming on the night of the offense "affected her ability to perceive," and (7) considering White's past relationship with Sampson, "she may have another agenda here that we don't even know about." On appeal, Sampson does not indicate what additional questions or arguments he believes counsel should have made. Sampson has simply failed to show that his attorney's cross-examination of White, or his closing arguments, were deficient.

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[2] Sampson also argues that defense counsel was ineffective for failing to object to the prosecutor's misconduct. Because we have concluded that the record in no way supports Sampson's claims of prosecutorial misconduct, this ineffective assistance claim also cannot succeed. *Fonville*, 291 Mich App at 384.

Pursuant to our remand order, the trial court (though not the judge who presided over the trial) conducted an evidentiary hearing on Sampson's claim that his attorney fell asleep during trial, and thereby completely deprived Sampson of the assistance of counsel, or rendered counsel's assistance constitutionally ineffective. Witnesses testified that Sampson's counsel sometimes appeared to be inattentive or sleeping during portions of the trial, and some claimed to have heard sounds similar to snoring. Sampson's counsel denied sleeping during trial, but explained that he may have appeared inattentive or sleeping at times because a breathing problem caused him to wheeze and because he sometimes closed his eyes to listen intently to testimony. The court presiding over the trial stated that it did not see counsel asleep, nor did the prosecuting attorney. The trial court found that the evidence did not establish that counsel fell asleep for any duration to the point where Sampson was completely denied the assistance of counsel. Accordingly, the court proceeded to determine whether Sampson was prejudiced because his attorney may have fallen asleep during portions of the trial. Because of the conflicting evidence, the trial court endeavored to examine the trial record to determine whether it showed that counsel was inattentive or inactive at inappropriate times during trial.[3]

We, too, will proceed to decide this issue while operating under the assumption that counsel fell asleep during the portions of the trial alleged by defendant, i.e., during portions of the testimony of the medical examiner, Ramon Files, and Felicia Norman. With this assumption, we must determine whether this was a critical part of the trial, and if not, whether defendant was prejudiced by counsel's inattentiveness. See, e.g., *Muniz v Smith*, 647 F3d 619, 623-624 (CA 6, 2011), and cases cited therein. Because there was no finding or evidence that defendant's counsel slept during a substantial portion of the trial, we conclude that the prejudice standard applies. *Id*. For the reasons outlined below, we hold that defendant was not prejudiced by his counsel's actions.

The trial court observed that the record disclosed that counsel did "a substantial cross-examination" of White, which encompassed matters that had not already been covered by other defense attorneys. The record indicates that Sampson's attorney was the second defense attorney to cross-examine White. Warner's counsel initially cross-examined White, followed by Sampson's counsel, and then Cummings's attorney.[4] At the evidentiary hearing, Sampson was unable to identify any particular points that he wanted counsel to explore with White, other than the color of the van that was set on fire. However, as we noted, Sampson's counsel did cross-examine White on this subject, eliciting that she had described the van as green, and using photographs of the van to elicit her admission that the photos showed that the van was actually red. In addition, during the prosecutor's direct examination of White, Sampson's counsel interposed appropriate objections to White's direct examination testimony. This record discloses

[3] In fact, the trial court on remand never explicitly found one way or the other on this issue but appears to have assumed counsel may have fallen asleep during limited portions of trial, and proceeded to a prejudice analysis.

[4] Warner's counsel's cross-examination consists of 70 transcript pages, Sampson's counsel's cross-examination consists of 23 transcript pages, and Cummings's counsel's cross-examination consists of three pages.

that defense counsel was attentive and effective during the testimony of White, the prosecution's key witness.

Sampson also put forward evidence at the remand hearing that defense counsel was asleep during the testimony of witnesses Ramon Files, Felicia Norman, and the medical examiner. The record discloses that Warner's counsel conducted most of the cross-examination of the medical examiner. After he finished, Sampson's counsel declined to ask any further questions, while Cummings's attorney limited his cross-examination to only two questions. This record supports the trial court's determination that further cross-examination by Sampson's attorney was not necessary because Warner's counsel had already cross-examined the witness. Indeed, on appeal, Sampson does not identify any additional questions that he believes his counsel should have asked the medical examiner and failed to do so.

Likewise, the record indicates that Sampson's counsel actively participated in the cross-examination of Felicia Norman, eliciting that Norman had known White for 17 years, that Norman had known White to drink on occasion and had observed White drunk, that White appeared "high" when she initially told Norman about the events that she observed on the night of the offense, and that White used the word "shoot" and not "kill" when White described what she heard Sampson say to Warner. Sampson's counsel later participated in recross-examination of Norman, eliciting that Norman did not tell White to call the police after White told Norman what happened. Although Sampson's counsel did not cross-examine witness Ramon Files, that witness's testimony was limited to the incident in September 2011 when Warner and Cummings appeared at White's house. Because Sampson was not involved in that incident, there was no reason for Sampson's counsel to cross-examine him. Again, Sampson does not identify any questions that he believes counsel should have asked Files and failed to do so.

As we detailed previously, the record also discloses that Sampson's attorney gave a comprehensive closing argument that reflected his awareness of the material issues and evidence in the case. In light of this record, we find no clear err in the trial court's findings that (1) there was no complete denial of counsel during trial, and (2) to the extent that counsel "did happen to doze off during a couple portions of the trial," Sampson failed to demonstrate any resulting prejudice. Thus, the trial court did not err in rejecting Sampson's claim.

Finally, we reject Sampson's argument that his constitutional right to his own copy of the trial transcripts was violated when both the trial court and appointed appellate counsel refused to provide him with a copy to enable him to prepare a Standard 4 brief.

A state must only provide an indigent defendant 'with means of presenting his contention to the appellate court which are as good as those available to a nonindigent defendant with similar contentions." An indigent defendant has a constitutional right to be represented by counsel, or to represent himself, but not both. *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994). With these principles in mind, we conclude that the trial court adequately protected Sampson's constitutional rights by providing Sampson's appointed appellate counsel with a copy of the trial transcripts at public expense. Accordingly, where defendant is represented by appointed appellate counsel and counsel has obtained a free copy of the transcripts, there is no additional constitutional requirement that defendant be given access to another transcript to prepare and file a Standard 4 brief.

We also disagree with Sampson's argument that he has a right to a copy of the transcripts under MCR 6.433(A), which provides:

> An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right. The court must order the clerk to provide the defendant with copies of documents without cost to the defendant, and, unless the transcript has already been ordered as provided in MCR 6.425(G)(2), must order the preparation of the transcript.

Under the predecessor to this rule, our Supreme Court held that a defendant who is represented by counsel on appeal is not entitled to his own copy of the transcript while his appeal of right is still pending. *Larkin v Kent Circuit Judge*, 397 Mich 611, 612-613; 246 NW2d 827 (1976). Nothing in the rule indicates that defendant is entitled to anything more than one set of transcripts. Where the defendant is represented by appellate counsel and transcripts have been provided to counsel, the defendant is not entitled to his own set.

Sampson also argues that appellate counsel was ineffective for not providing him with copies of the transcripts so that Sampson could prepare his Standard 4 brief. The same test for effective assistance of trial counsel applies to appellate counsel. *People v Uphaus (On Remand)*, 278 Mich App 174, 186; 748 NW2d 899 (2008). Therefore, Sampson must show both that appellate counsel's conduct was objectively unreasonable and resulting prejudice. *Id*. We have not found any controlling authority for the proposition that appellate counsel is required to give a defendant trial transcripts on the defendant's request. Moreover, Sampson has been able to raise issues in his Standard 4 brief, and our review of the record does not reveal any plausible support for Sampson's pro se arguments. Accordingly, we conclude that Sampson's ineffective assistance of appellate counsel argument must fail.

We affirm Warner's and Cummings convictions and sentences in Docket Nos. 311034 and 311215, respectively. In Docket No. 315252, we vacate defendant Sampson's conviction and sentence for solicitation of murder, but affirm in all other respects.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro